In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-747

DAN J. SHEEHAN COMPANY, PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that the enforcement provisions of the Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. 651 *et seq.*, violate due process of law by imposing a "chill" on the exercise of an employer's right to a hearing under the Act.

1. The background and structure of the Occupational Safety and Health Act of 1970 are detailed in our brief in opposition to a related petition, *Frank Irey, Jr., Inc.* v. *Occupational Safety and Health Review Commission,* No. 75-748, and will not be repeated here except as relevant to petitioner's claims. The Act, passed "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions," 29 U.S.C. 651, was intended to encourage employers voluntarily to reduce worksite safety and health hazards. The Secretary of

Labor was empowered to issue mandatory safety and health standards for such employers and to police these requirements with "an effective enforcement program." 29 U.S.C. 651(3), (10).

Under the Act's expedited enforcement procedures, the Secretary is authorized to inspect places of employment, issue citations to employers for safety and health violations discovered at the worksite, and propose civil penalties and reasonable abatement periods for such violations. 29 U.S.C. 657(a), 658(a), 659(a). These proposed assessments, which range from zero for *de minimis* or non-serious violations, to $1,000 for serious violations, to not more than $10,000 for willful or repeated violations, also may include a civil penalty of up to $1,000 per day where subsequent inspection reveals that a prior abatement order has not been satisfied. 29 U.S.C. 659 (b), 666(a)-(d). All such assessments must be based on the gravity of the violation and the cited employer's size, good faith safety efforts, and past safety history. 29 U.S.C. 666(i).

If an employer wishes to contest the citation and/or proposed penalty, he must notify the Secretary within 15 working days; in the absence of such notice, the citation and penalty become final. 29 U.S.C. 659(a), (c), 660(b). If an employer timely contests the citation, any abatement requirement is suspended pending a final administrative ruling and the case is scheduled for hearing before an administrative law judge of the Occupational Safety and Health Review Commission, an adjudicatory agency independent of the Secretary. 29 U.S.C. 659(b), (c), 661, 666(d). The judge's decision becomes the final order of the Commission unless a Commissioner directs review within 30 days of its issuance. 29 U.S.C. 659(c), 661(i).

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If review is directed, the Commission's subsequent order becomes final unless the aggrieved employer timely petitions for judicial review in the appropriate court of appeals. While the filing of a petition for review does not automatically stay the effectiveness of the Commission's order, either the Commission or the reviewing court may grant a stay pending judicial review. 29 U.S.C. 660(a); 29 C.F.R. 2200.92.

If the Secretary determines that an employer's contest of a citation was in bad faith or solely for purposes of delay, the Secretary may propose per diem penalties retroactive to the original abatement date set by the contested citation. The employer, of course, may challenge these monetary assessments in the same manner as he may contest any other proposed penalty, including review by the Commission and the court of appeals. 29 U.S.C. 659(b), (c), 666(d). See *Lake Butler Apparel Co.* v. *Secretary of Labor,* 519 F.2d 84, 87 (C.A. 5).

2. In July 1973, an employee of petitioner Dan J. Sheehan Company was electrocuted when he came into contact with a high-voltage line. As a result of this fatality, the Secretary inspected petitioner's worksite and cited petitioner for a serious safety violation,[1] ordered that the unsafe condition be abated immediately, and proposed a $500 penalty. Petitioner contested only the proposed

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[1]The facts showed that petitioner's "employees were required or permitted to perform work on a metal scaffold which was erected at the site of an approximate height of 36 feet and within approximately 1 foot of an electrically charged power line carrying current in excess of 7,000 volts" (Pet. App. 1b). The Secretary therefore determined that petitioner had violated 29 U.S.C. 654(a)(1), which requires an employer to furnish places of employment that "are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

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penalty and a hearing was held before an administrative law judge limited to that issue (Pet. App. 2a-3a; 1b-6b).

The judge concluded that the Secretary had properly considered the relevant statutory factors in proposing the penalty and that the amount of the penalty was appropriate in light of those factors (Pet. App. 4b-6b). This decision became the final order of the Commission when no Commissioner directed further review. On petitioner's motion, however, the Commission stayed its order pending review in the court of appeals (Pet. App. 3a; 6b). On October 8, 1975, the United States Court of Appeals for the Fifth Circuit unanimously affirmed the Commission's order (Pet. App. 1a-8a; 520 F.2d 1036).

Petitioner contends (Pet. 4-8) that three aspects of the Act's civil enforcement scheme unconstitutionally "chill" the exercise of an employer's right to a hearing. The court of appeals correctly rejected this claim, which relies totally upon language in several recent decisions of this Court involving inapposite *criminal* sanctions (Pet. App. 5a-8a). Moreover, the ruling of the court below is in accord with the decisions of other circuits that have considered the issue. See *Clarkson Construction Co.* v. *Occupational Safety and Health Review Commission*, C.A. 10, No. 75-1070, decided January 21, 1976; *Brennan* v. *Winters Battery Manufacturing Co.*, C.A. 6, No. 75-1367, decided December 18, 1975; cf. *REA Express, Inc.* v. *Brennan*, 495 F.2d 822, 825 (C.A. 2); *Brennan* v. *Occupational Safety and Health Review Commission*, 487 F.2d 438, 442 (C.A. 8).[2] There is no necessity for further review.

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[2]Although dicta in *Frank Irey, Jr., Inc.* v. *Occupational Safety and Health Review Commission*, 519 F.2d 1200, 1202-1203 (C.A. 3), affirmed *en banc*, 519 F.2d 1215, pending on petition for a writ of certiorari, No. 75-748, and *Dale M. Madden Construction Co., Inc.* v. *Hodgson*, 502 F. 2d 278, 281 (C.A. 9), suggest that the Commission may lack authority to increase the penalty proposed by the Secretary, no circuit has held that the Commission is without power to adjust a proposed penalty and the court of appeals here assumed such power *arguendo*. Cf. 29 U.S.C. 659(c).

a. Petitioner's primary contention—that the Commission's authority to assess a higher monetary penalty after a hearing than that proposed by the Secretary is an unlawful deterrent to an employer's decision to seek Commission review—is both factually and legally erroneous. An increase in penalty, which may be ordered only after a full evidentiary proceeding before an independent administrative law judge, would represent not an attempt to discourage review, but merely a more informed evaluation of the salient facts in light of the relevant statutory factors, such as the gravity of the violation and the past history of the employer. 29 U.S.C. 666(i).[3]

Moreover, petitioner has suggested no logical reason why the Commission, an independent agency whose sole function is the adjudication of complaints initiated by employer contests, would desire to discourage review of the Secretary's determinations or to "punish" employers who seek review. The Commission's power to modify penalties actually has provided an incentive rather than a deterrent to review, since a study of more than 300 recent Commission decisions reveals that it has increased the penalty in only five percent of its cases while it has *reduced* the penalty in more than 50 percent of the cases.[4] Finally, in the instant case the Commission did not increase the penalty proposed by the Secretary (Pet. App. 4a-5a).

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[3]The Secretary's proposed penalty, of course, is based upon a worksite inspection, which may not include a thorough investigation and will certainly not reflect comprehensive evidence of the type adduced at an administrative hearing. 29 U.S.C. 658(a).

[4]These figures were compiled by the Management Information System of the Occupational Safety and Health Review Commission.

Nor would the due process clause be violated even if the Commission exercised its power to assess higher penalties with greater frequency. In the area of criminal law (where the desire to deter or punish appellants obviously may be far stronger than here), this Court has held that the due process clause does not necessarily prohibit a state from imposing a greater sentence upon a defendant after a retrial. In *Colten* v. *Kentucky*, 407 U.S. 104, for example, the Court upheld a two-tier system that afforded defendants convicted in an inferior court a complete trial *de novo* in a higher court, with the possibility of a greater punishment upon conviction. See also *Chaffin* v. *Stynchcombe*, 412 U.S. 17; *North Carolina* v. *Pearce*, 395 U.S. 711. As the Court noted in *Blackledge* v. *Perry*, 417 U.S. 21, 27:

> The lesson that emerges from *Pearce*, *Colten*, and *Chaffin* is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of "vindictiveness."

The court of appeals properly concluded that there was no "realistic likelihood" of vindictiveness under the Act (Pet. App. 6a-7a):

> The OSHA review system is not unlike the system involved in *Colten*. In each system, the body which has the power to increase the penalty is not the same body which imposed the initial, lighter penalty. Thus the Commission will not have the same personal stake in seeing that the Secretary's orders go unchallenged as it would if it were protecting its own orders.

Moreover, as the court below also indicated (Pet. App. 7a), the Commission's discretion to increase a penalty proposal is institutionally limited by the narrow range of permissible penalties under the Act and by the explicit statutory criteria that must be applied as a matter of record to justify *any* penalty assessment. 29 U.S.C. 666(i). Thus, the Commission must affirmatively state its reasons for imposing a higher penalty and its decision is not hidden, but is fully subject to effective review in the court of appeals.

Finally, as indicated above, the Commission's sole statutory responsibility is to adjudicate contested citations and penalties under the Act; it strains common sense to suggest that the statutory scheme authorizing review by the Commission also gives rise to an institutional vindictiveness against the only class of persons—employers—who are able to initiate Commission review. Consequently, there is no reasonable basis for an employer to be dissuaded from contesting the Secretary's action or for the Commission to be motivated by improper considerations in reviewing a disputed citation or civil penalty.

b. Petitioner's second contention is that the Secretary's authority to propose retroactive penalties for nonabatement, if he finds that the employer sought review of a citation in bad faith or for the purpose of delaying compliance, "chills" the employer's right to a hearing. This claim is equally unpersuasive; not only has the Secretary never invoked this provision, but a retroactive nonabatement penalty would be subject to the same review procedures as any other penalty, including judicial review. 29 U.S.C. 659(b), (c), 666(d). See *Lake Butler Apparel Co.* v. *Secretary of Labor, supra,* 519 F.2d at 87. Furthermore, as the Court emphasized in *Chaffin* v. *Stynchcombe, supra,* 412 U.S. at 30, the relevant question in analyzing a claim of

"chilling effect" is whether the alleged "chill" is unnecessary to the achievement of some legitimate goal. The Secretary must possess the discretionary authority to deal effectively with the rare occasion when an employer, in bad faith, uses the opportunity for review solely to evade his statutory duty to correct a clearly unsafe or unhealthy working condition.

c. Finally, petitioner contends that the Act is constitutionally defective because the Commission's orders are not automatically stayed pending a petition for review in the court of appeals. However, an employer may seek a stay from the Commission or the court of appeals and, as in the instant case (Pet. App. 3a, 8a), such stays are freely granted.[5] See 29 U.S.C. 660(a); *Lance Roofing Co.* v. *Hodgson*, 343 F. Supp. 685, 689-690 (N.D. Ga.), affirmed, 409 U.S. 1070. Thus, the court of appeals correctly concluded that (Pet. App. 8a):

> [A]n employer is not likely to be deterred from appealing an incorrect decision because of the necessity for asking for a stay from the court or Commission.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

WILLIAM J. KILBERG,
Solicitor of Labor,
Department of Labor.

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[5]This statutory provision is not unique. See, *e.g.*, Section 106(e) of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 755, 30 U.S.C. 816(e), a statute recently construed by the Court in *National Independent Coal Operator's Association* v. *Kleppe*, No. 73-2066, decided January 26, 1976, and Section 10(g) of the National Labor Relations Act, 49 Stat. 455, 29 U.S.C. 160(g).

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